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Donald Allen Pile

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EXAMINER

FELTON, AILEEN BAKER

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Please find below and/or attached an Office communication concerning this application or proceeding.

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/764,246
Filing Date: January 23, 2004
Appellant(s): PILE ET AL.

For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 5/29/2008 appealing from the Office action mailed 12/27/2007.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

6,478,903	John, Jr et al	11-2002
5,654,520	Boberg et al	08-1997

4,853,052

Calsson et al

08-1989

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1, 3-16, 18-22, 32-38, 40, 41, 44, and 45 are rejected under 35 U.S.C. 103(a) as being unpatentable over John, Jr. et al (6,478,903) in view of Boberg (5,654,520) or Calsson (4,853,052).

John, Jr. et al discloses the composition substantially as claimed including an oxidizer such as potassium nitrate from 20-70 % (col. 2, lines 50-55), a secondary explosive such as PETN at 3%(col. 4, lines 35-37 and Table 1), a sensitizer such as tetrazene from 4-11 % (col. 4, lines 37-47), and a metallic fuel such as aluminum from 2-20 % (col. 4, lines 55-65). The composition also includes bismuth sulfide as the fuel or inflammable material in the primer mix (col. 2, lines 45-65) but does not mention the use of bismuth oxide.

Both Boberg (examples) and Calsson (col. 2 table) teach that it is known to use bismuth trioxide in amounts greater than 15 % in a primer composition.

It would have been obvious to one of skill in the art at the time the invention was made to use the bismuth trioxide as taught by Boberg or Calsson with the composition of John, Jr. et al since Boberg or Calsson suggests that the bismuth trioxide catalyst has been found to be applicable to priming mixtures generally and since John, Jr. et al suggests the use of a bismuth salt for use in priming compositions. Alternatively, it is prima facie obvious to combine two compositions, each taught for the same purpose to

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yield a third composition for that very purpose. *In re Kerkhoven*, 205 USPQ 1069, *In re Pinten*, 173 USPQ 801, and *In re Susi*, 169 USPQ 423.

(10) Response to Argument

Applicant argues that there is no suggestion to combine the references and alleges that the combination would not function as a small arms primer due to the difference in the type of primer. The Examiner disagrees. First, since all three patents relate to primers, it would be obvious to use the bismuth trioxide as taught by Boberg or Calsson with the primer of John, Jr. since both Boberg and Calsson teach that it is known to use bismuth trioxide as an oxidizer in a priming composition. The delay effects would not be caused by the use of bismuth trioxide since it is the composition as a whole that causes a slower burn rate. Second, Applicant's argument that the burn rates disclosed by Boberg are written incorrectly is unpersuasive. There is a presumption of validity of an issued patent and there has been no evidence provided to show that it is wrong. Affidavits or declarations attacking the operability of a patent cited as a reference must rebut the presumption of operability by a preponderance of the evidence. *In re Sasse*, 629 F.2d 675, 207 USPQ 107 (CCPA 1980). Applicant's opinion, as stated in the declaration, is simply not sufficient to rebut an issued patent. Even if this argument were persuasive, it should be noted that the burn rates are not claimed and that the burn rate would be an inherent property of a composition as disclosed and taught. Further, note that it is obvious to use one oxidizer in place of another in a priming composition and since all three references are priming compositions, it would

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be obvious to use the bismuth trioxide as taught. Again, it is the composition as a whole that causes the slower burn rate, the teachings of Boberg and Calsson are still relevant to show that bismuth trioxide is a known oxidizer that is used in priming compositions.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Aileen Felton/
Primary Examiner

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Supervisory Patent Examiner, Art Unit 1793

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